

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: GENERIC DIGOXIN AND
DOXYCYCLINE ANTITRUST
LITIGATION**

**MDL No. 2724
No. 16-md-2724**

THIS DOCUMENT RELATES TO:

HON. CYNTHIA M. RUFÉ

*Direct Purchaser Plaintiff and End-Payer
Plaintiff Actions*

**DIRECT PURCHASER CLASS PLAINTIFFS' AND END-PAYER CLASS PLAINTIFFS'
PROPOSALS FOR APPOINTMENT OF LIAISON COUNSEL**

Pursuant to paragraph 4.A of Pretrial Order No. 1 (ECF No. 2), Direct Purchaser Plaintiffs¹ (DPPs) and End-Payer Plaintiffs² (EPPs) herein respectfully propose candidates for appointment of Liaison Counsel for DPPs and Liaison Counsel for EPPs.

¹ Direct-Purchaser Plaintiff class actions include: *KPH Healthcare Services, Inc. v. Lannett Co., Inc.*, No. 16-cv-2432 (E.D. Pa.); *Rochester Drug Co-Operative, Inc. v. Allergan plc*, No. 16-cv-3189 (E.D. Pa.); *Cesar Castillo Inc. v. Allergan plc*, No. 16-cv-3525 (E.D. Pa.); and *Ahold USA, Inc. v. Lannett Co. Inc.*, No. 16-cv-3844.

² End-Payer Plaintiff class actions include: *Int'l Union of Operating Engineers Local 30 Benefits Fund v. Lannett Co., Inc.*, No. 16-cv-990 (E.D. Pa.); *NECA-IBEW Welfare Trust Fund v. Allergan plc*, No. 16-cv-1371 (E.D. Pa.); *Tulsa Firefighters Health and Welfare Trust v. Allergan plc*, No. 16-cv-1388 (E.D. Pa.); *Twin Cities Pipe Trades Welfare Fund v. Lannett Co. Inc.*, No. 16-1534 (E.D. Pa.); *Carpinelli v. Lannett Co., Inc.*, No. 16-cv-1954 (E.D. Pa.); *Fraternal Order of Police, Miami Lodge 20 Ins. Trust Fund v. Allergan plc*, No. 16-cv-2031 (E.D. Pa.); *Diamond v. Lannett Co., Inc.*, No. 16-cv-2077 (E.D. Pa.); *UFC Local 1500 Welfare Fund v. Allergan plc*, No. 16-cv-2169 (E.D. Pa.); *Minnesota Laborers Health and Welfare Fund v. Lannett Co., Inc.*, No. 16-cv-2191 (E.D. Pa.); *Phila. Fed'n of Teachers Health and Welfare Fund v. Lannett Co. Inc.*, No. 16-cv-2468 (E.D. Pa.); *United Food & Commercial Workers and Emp. Ariz. Health & Welfare Trust v. Lannett Co., Inc.*, No. 16-cv-2810 (E.D. Pa.); *McCrary v. Lannett Co., Inc.*, No. 16-cv-3091 (E.D. Pa.); *Plumbers & Pipefitters Local 33 Health and Welfare Fund v. Allergan plc*, No. 16-cv-3576 (E.D. Pa.); *Plumbers & Pipefitters Local 178 Health and Welfare Fund v. Lannett Co., Inc.*, No. 16-cv-3635 (E.D. Pa.); and *City of Providence, R.I. v. Allergan plc*, No. 16-cv-214 (D.R.I.).

1. DPP and EPP Proposals for Appointment of Liaison Counsel.

DPPs and EPPs plead common allegations that Defendants engaged in an unlawful price-fixing scheme for generic digoxin and doxycycline. But, as explained further below, DPP and EPP classes differ in significant ways. Most notably, their damages claims arise under different laws and, consequently, their interests diverge in key respects.

Accordingly, mindful of the requirements of “structural assurance of fair and adequate representation for the diverse groups . . . affected,” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997), and consistent with the Court’s Order that “[c]ounsel for each group of parties whose interests are similarly aligned . . . confer and seek consensus on candidates for the position of Liaison Counsel” (PTO No. 1 at 3), Plaintiffs respectfully request the appointment of separate and independent Liaison Counsel for Direct-Purchaser Plaintiffs and End-Payer Plaintiffs to perform the administrative functions outlined by the Court.

A. Proposed Liaison Counsel for Direct-Purchaser Plaintiffs.

Direct Purchaser Plaintiffs unanimously propose the following candidate for appointment as Liaison Counsel for their plaintiff group:

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Led by Dianne M. Nast, NastLaw LLC attorneys combine over 85 years of complex civil litigation experience. The firm’s focus is on complex civil litigation, including pharmaceutical antitrust litigation. Firm founder, Dianne Nast, brings decades of complex litigation experience to the firm. Ms. Nast’s curriculum vitae and firm resume are attached hereto as Exhibit A.

B. Proposed Liaison Counsel for End-Payer Plaintiffs.

End-Payer Plaintiffs unanimously³ propose the following candidate for appointment as Liaison Counsel for their plaintiff group:

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Fine, Kaplan and Black (FKB) is a nationally recognized firm with a long track record of success in complex antitrust litigation, including pharmaceutical antitrust litigation such as this. Roberta Liebenberg has extensive experience litigating in this District, is familiar with its procedures and protocols, and is eminently qualified to perform the tasks required of liaison counsel. Ms. Liebenberg's curriculum vitae and that of her firm partner Paul Costa, who will assist her in this matter, along with FKB's firm resume, are attached hereto as Exhibit B.

2. Appointment of Independent Liaison Counsel for Each Plaintiff Group Is Warranted.

A. DPPs and EPPs are differently situated and bring different claims.

This multidistrict litigation involves two distinct proposed classes: (1) direct purchasers—business entities that purchased generic digoxin and doxycycline directly from Defendants at allegedly artificially inflated prices; and (2) end-payers—persons and entities that purchased, paid, or provided reimbursement for some or all of the allegedly artificially inflated purchase price of generic digoxin or doxycycline manufactured by Defendants, but that neither purchased directly from Defendants nor resold the products. Not only are the class members

³ The case filed by End-Payer Plaintiff City of Providence, Rhode Island has not yet been transferred to this District and is not yet before the Court, but City of Providence does not oppose this appointment.

differently situated, but also, with the exception of claims for injunctive relief under the federal antitrust laws, they bring different claims: DPPs bring treble damages claims for violation of Section 1 of the Sherman Act,⁴ while EPPs bring damages claims under the antitrust laws, consumer protection statutes, and common law of 31 states and the District of Columbia.⁵

This is a result of federal antitrust law, which presents materially distinct issues for direct purchasers and end-payers. In *Illinois Brick Co. v. Illinois*, the Supreme Court held that, with limited exceptions, only those who purchase an allegedly price-fixed product *directly* from a defendant have antitrust standing to seek damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. 431 U.S. 720 728-29, 746 (1977); *see also* *Mid-W. Paper Prod. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 577 (3d Cir. 1979). Indirect purchasers (here, end-payers) of a price-fixed product—that is, those further down the distribution chain—are thus generally barred from seeking money damages under the federal antitrust laws, but still may bring claims for injunctive relief from such violations under Section 16 of the Clayton Act, *Midwest Paper Prod. Co.*, 596 F.2d at 590-94, and claims for damages under state antitrust statutes and other relevant state law, *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989).

Although proof of liability will be common to both direct-purchaser and end-payer classes, because they are differently situated in terms of the types of damages claims they bring

⁴ *See, e.g.*, Compl. at 33, *KPH Healthcare Servs., Inc. a/k/a Kinney Drugs, Inc. v. Lannett Co., Inc.*, No. 16-cv-2432 (E.D. Pa. May 18, 2016) (bringing claims for damages and injunctive relief under the Sherman and Clayton Acts).

⁵ *See, e.g.*, Am. Compl. at 49 & n.63, *Int'l Union of Operating Engineers Local 30 Benefits Fund v. Lannett Co. Inc.*, No. 16-cv-990 (E.D. Pa. June 9, 2016) (bringing claims for injunctive relief under the Sherman Act and for damages under the competition and consumer protection laws of Alabama, Arkansas, Arizona, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia and Wisconsin).

and, correspondingly, the nature of the proof they must present, the interests of the classes are not completely aligned at all stages of the litigation. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262, 2011 WL 5007957, at *2 (S.D.N.Y. Oct. 18, 2011).

Accordingly, the discovery and expert analyses required and sought by each class, though overlapping in some respects, will differ significantly on certain issues. Likewise, interests at settlement may differ as each plaintiff group seeks to maximize recovery for its members from the settlement. *See, e.g., LIBOR*, 2011 WL 5007957, at *2 (noting potential for differing positions in litigation and settlement).

This distinction between direct- and indirect-purchaser claims in cases centralized before one court, as here, is regularly reflected in the case management structure adopted. For example, rather than consolidating direct and indirect (including end-payer) purchaser actions together in a single complaint, courts typically coordinate the cases as separate actions, requiring cooperation between those groups for discovery and other pre-trial matters, but maintain separate actions and order that separate consolidated class action complaints be filed for each. *See, e.g., Case Management Order No. 1 Consolidating & Coordinating Cases, In re Lipitor Antitrust Litig.*, No. 12-cv-2389 (D.N.J. Aug. 10, 2012) (ECF No. 109) (coordinating direct-purchaser and end-payer actions, consolidating direct purchaser actions, consolidating end-payer purchaser actions, and directing each plaintiff group to file separate consolidated class action complaints).⁶

B. Appointment of separate, independent Liaison and Interim Class Counsel for each plaintiff group is an accepted management practice in antitrust cases.

This Court's Pretrial Order No. 1, in directing applications for a plaintiffs' steering

⁶ *See also, e.g.,* Pre-trial Order No. 2, *In re Effexor XR Antitrust Litig.*, No. 11-cv-5479 (D.N.J. Dec. 13, 2011) (ECF No. 85) (coordinating direct and end-payer purchaser actions); *In re Remeron End-Payer Antitrust Litig.*, No. 02-cv-2007, 2005 WL 2230314, at *2 (D.N.J. Sept. 13, 2005) (noting the court had ordered coordinated discovery in the end-payer and direct purchaser actions).

committee and proposals for appointment of liaison counsel, recognizes the need for a leadership structure to ensure efficient prosecution of litigation. Courts overseeing multidistrict class actions involving numerous plaintiffs and complaints routinely appoint interim class counsel under Rule 23(g)(3) of the Federal Rules of Civil Procedure, which authorizes this designation prior to class certification. *See* H. Newberg & A. Conte, *Newberg on Class Actions*, §9.35 at 387 (4th ed.). And where, as here, the litigation includes both direct- and indirect-purchaser actions under state and federal antitrust laws, courts in this Circuit and in others typically appoint separate liaison counsel (and separate interim class counsel) for each plaintiff group. *See, e.g.*, Case Management Order Nos. 1 & 4, *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002 (E.D. Pa. Dec. 12, 2008 & Jan. 9, 2009) (ECF Nos. 3 & 20) (appointing interim co-lead class counsel and liaison counsel for direct purchaser plaintiffs and inviting petitions from indirect purchaser plaintiffs for same, and appointing interim co-lead class counsel and liaison counsel for indirect purchaser plaintiffs, respectively).⁷

⁷ Additional examples in this Circuit include: Order, *In re Niaspan Antitrust Litig.*, No. 13-md-2460 (E.D. Pa. Dec. 23, 2013) (ECF No. 36) (appointing separate leadership and liaison counsel for direct purchaser and end-payer actions); Pretrial Order #2, *In re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig.*, No. 13-md-2445 (E.D. Pa. Aug. 7, 2013) (ECF No. 44) (appointing separate leadership and liaison counsel for direct and indirect-purchaser plaintiffs); Case Management Order No. 1 Consolidating & Coordinating Cases, *In re Lipitor Antitrust Litig.*, No. 12-cv-2389 (D.N.J. Aug. 10, 2012) (ECF No. 109) (same); Case Management Order # 2 Appointing Interim Class Counsel, *In re Effexor XR Antitrust Litig.*, No. 11-cv-5479 (D.N.J. Dec. 13, 2011) (ECF No. 85) (same); Case Management Order No. 5, *In re Chocolate Confectionary Antitrust Litig.*, No. 08-mdl-1935 (M.D. Pa. July 14, 2008) (ECF No. 387) (appointing separate lead counsel, local counsel, and executive committees for direct purchaser plaintiffs, indirect business purchaser plaintiffs, and indirect end-user plaintiffs); Orders, *In re Hydrogen Peroxide Antitrust Litig.*, No. 05-cv-666, MDL No. 1682 (E.D. Pa. Mar. 28, 2005 & Oct. 13, 2005) (ECF Nos. 25 and 97) (appointing interim co-lead counsel for direct-purchaser plaintiffs, and appointing interim co-lead counsel for indirect-purchaser plaintiffs and directing IPPs to coordinate and communicate with direct purchaser plaintiffs).

Examples from outside this Circuit include: Mem. & Order, *In re Parking Heaters Antitrust Litig.*, No. 15-md-940 (E.D.N.Y. Aug. 11, 2015) (ECF No. 49) (appointing separate interim co-lead counsel and liaison for DPPs and IPPs); Order Following Case Management

Consistent with this accepted practice, Plaintiffs respectfully request that the Court do the same here, and appoint separate liaison counsel for each plaintiff group. Counsel for the Plaintiffs also believe that the Court should appoint separate leadership for each proposed class and will be prepared to discuss this issue at the September 8, 2016 Case Management Conference.

3. All Plaintiffs Support the Appointment of Liaison Counsel for Defendants.

Plaintiffs appreciate the Court's request for nominations by the Defendants for Defense Liaison Counsel and believe such an appointment will facilitate the efficient and effective management of these matters.

Conference, *In re Resistors Antitrust Litig.*, No. 15-cv-3820 (N.D. Cal. Dec. 21, 2015) (ECF No. 89) (appointing separate interim lead class counsel for direct purchaser plaintiffs and indirect purchaser plaintiffs); Am. Case Management Order No. 1, *In re Nexium (Esomeprazole) Antitrust Litig.*, No. 12-md- 2409 (D. Mass. Jan. 16, 2013) (ECF No. 85) (recognizing the need for separate organizational structures to protect the respective classes); Order Appointing Interim Lead and Liaison Counsel for Direct Purchaser Actions & Order Appointing Interim Lead and Liaison Counsel for Indirect Purchaser Actions, *In re Auto. Wire Harness Systems Antitrust Litig.*, No. 12-md-2311 (E.D. Mich. Mar. 19, 2012 & Mar. 23, 2012) (ECF Nos. 60 & 65) (appointing interim lead and liaison counsel for direct purchaser plaintiffs and granting end-payer plaintiffs' application for appointment of interim co-lead class counsel, respectively); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11- md-2262, 2011 WL 5007957, at **2-3 (S.D.N.Y. Oct. 18, 2011) (finding that it is a "commonsense approach" to divide plaintiffs into putative classes and appoint interim counsel for each class because joint representation of differently positioned classes creates a potential conflict); *In re Packaged Ice Litig.*, No. 08-md-01952, 2009 WL 1518428, at *1 (E.D. Mich. June 1, 2009) (in antitrust action, appointing separate liaison and interim class counsel for direct and indirect purchaser classes); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-md-1827 (N.D. Cal. July 13, 2007) (order appointing separate interim counsel for classes of direct purchasers and indirect purchasers).

Dated: September 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2016, a copy of the foregoing was served upon all counsel of record via ECF.

/s/ Dianne M. Nast
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